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No. 09-687

Supreme Court, U.S.
JAN 13 2010

IN THE
Supreme Court of the United States

UNC LEAR SERVICES, INC. AND
LEAR SIEGLER SERVICES, INC.,

Petitioners,

V.

KINGDOM OF SAUDI ARABIA AND
MINISTRY OF DEFENSE AND AVIATION OF
THE KINGDOM OF SAUDI ARABIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, a foreign state was immune from suit for alleged breach of a military defense contract for employment of military personnel and related tort claims.

2. Whether the court of appeals correctly recited the facts of the case based on the plain language of the foreign military defense contracts at issue.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.3d 210. Pet. App. 1-26. The opinion of the district court denying Respondents' motion to dismiss based on foreign sovereign immunity and *forum non conveniens* is available at 2008 WL 2946059. *Id.* at 27-86. The orders of the district court denying Respondents' motions to dismiss based on contractual forum selection clauses and the act of state doctrine are unreported. KRE3-030 to 032; KRE4-033 to 035.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2009. Petitions for rehearing were denied in a *per curiam* order on September 11, 2009. Pet. App. 87-88. The petition for a writ of certiorari was filed on December 10, 2009. Petitioners (together, "Lear") invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

1. Respondents, the Kingdom of Saudi Arabia and its Ministry of Defense and Aviation (together, the "Kingdom"), maintain a fleet of F-5 aircraft as part of the Kingdom's air defense systems. Pet. App. 2. The Kingdom purchased these aircraft from the United States government and, for many years, the Kingdom

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[1] We use the same shorthand as the Petition to cite to materials that are not included in the Appendix to the Petition. *See* Pet. nn.2-6.

contracted with the United States to obtain support services for the F-5 fleet. *Id.* The United States used private contractors, such as Lear, to fulfill the terms of those support agreements. *Id.*

In the mid-1990s, the Kingdom invited private contractors to bid directly to provide military support services for the F-5 fleet. *Id.* Two of Lear's bids were accepted. In 1995, the Kingdom and Lear entered into the F-5 Spare Parts and Ground Equipment ("SPAGE") contract. *Id.*; DX 1. More than a year later, in 1996, the Kingdom awarded a separate contract to Lear, the F-5 Technical Support Program ("TSP") contract. Pet. App. 3; DX 2. Both contracts specify a court in Saudi Arabia, the Board of Grievances, as the proper forum to resolve "[a]ny disputes" arising under the contracts. Pet. App. 19; KRE6-090.

Under the SPAGE contract, the Kingdom sent F-5 aircraft parts to Lear in San Antonio, Texas for repair. Pet. App. 2-3. Lear was responsible for arranging repair of the parts and returning them to the Kingdom in Saudi Arabia. *Id.* at 3.

Under the separate TSP contract, Lear sent hundreds of workers to Saudi Arabia to "augment, assist, train and advise" the Royal Saudi Air Force ("RSAF"). *Id.*; *accord* KRE6-096; *see also id.* ("The objective of this program is to use Contractor manpower to augment the RSAF in the accomplishment of the [RSAF] mission."). These Lear employees integrated into the RSAF chain of command, working "directly for and under the functional control of the RSAF" in Saudi Arabia. Pet. App. 3; *accord* KRE6-099; KRE6-097

("All directed manning augmentees provided by this [contract] shall be functionally controlled by the RSAF."). The TSP workers obtained access to "restricted security information" of the Saudi military, DX 2, General Provisions § 17, and many were required to possess a secret security clearance from the United States government. *See* DX 20.

The TSP contract specified, among other things, that Lear's employees within the RSAF would:

- provide flight operations, command, weapons, tactics, and life support training to RSAF personnel;
- operate a survival training center to educate RSAF aircrews in pre/post-ejection procedures, terrain-specific survival techniques, rescue and recovery operations, and escape and evasion methods;
- advise and assist with chemical warfare training;
- provide logistical support related to F-5 missile and munitions maintenance, disarmament and deployment, aircraft damage assessment, and engineering;
- operate a photo reconnaissance lab to train RSAF aircrews in aerial photo reconnaissance; and
- provide operational support for F-5 training simulators.

Pet. App. 3-4; DX 2, Annex B §§ 3, 4, 7, 8.

After both contracts expired in 1999, *see* Pet. App. 5; KRE6-088, several disputes arose. In 2003 and 2004, the parties met on multiple occasions in an unsuccessful effort to resolve Lear's grievances. Pet. App. 5. Lear could have filed suit, as the contracts specify, in the Board of Grievances in Saudi Arabia, but Lear did not do so.

2. Instead, on November 5, 2004, Lear sued the Kingdom in the United States District Court for the Western District of Texas. Pet. App. 6; Doc. 1. In its Complaint, Lear asserted claims for breach of the SPAGE and TSP contracts and various tort claims based on, among other things, an alleged order by the RSAF Deputy Commander, decisions by the Saudi taxing authority, and multiple legal proceedings in the Saudi courts. Doc 1:26-33.

The Kingdom moved to dismiss for improper venue based on the forum selection clauses in the SPAGE and TSP contracts. Pet. App. 6; LRE31; *see* Pet. App. 19; KRE6-090. On August 30, 2005, the district court denied the motion to dismiss on the ground that the forum selection clauses were purportedly permissive. Pet. App. 6; KRE3-032.

Thereafter, the Kingdom moved to dismiss on other grounds, including immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 ("FSIA"), *forum non conveniens*, and the act of state doctrine. Pet. App. 6. On March 2, 2006, the district court denied the motion in part, authorized jurisdictional discovery, and scheduled briefing only on foreign sovereign immunity and *forum non conveniens*. *Id.* at 6-7; KRE4-033 to 035.

On July 25, 2008, the district court denied the Kingdom's motion to dismiss based on foreign sovereign immunity and *forum non conveniens*. Pet. App. 27-28. First, the district court held that the Kingdom was amenable to suit in the United States under the FSIA's "commercial activity" exception to sovereign immunity. 28 U.S.C. § 1605(a)(2). Considering the contracts together as a single integrated whole, the court held that they were commercial in nature and that the Kingdom's alleged actions caused direct effects in the United States. Pet. App. 48-63. As to the nature of employing military personnel, the district court stated that this activity is governmental in nature only where employees serve "under the auspicious [*sic*] of a direct employment agreement," and not, as here, through a foreign state's contract with a third party. *Id.* at 54. The district court also denied the Kingdom's motion to dismiss for *forum non conveniens*, applying a "strong presumption" in favor of Lear's choice of a United States forum. *Id.* at 75-77.

3. On August 19, 2009, a unanimous panel of the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the denial of dismissal.[2] *Id.* at 1-26. Considering the contracts

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[2] The Kingdom appealed the denial of dismissal on foreign sovereign immunity grounds under the collateral order doctrine and sought review of the act of state issue based on the court of appeals' pendent appellate jurisdiction. Pet. App. 7. The court of appeals granted permission for the Kingdom to appeal the denial of dismissal based on the forum selection clauses and *forum non conveniens* after the district court certified those issues for immediate review under 28 U.S.C. § 1292(b). Pet. App. 7.

separately, the court of appeals held that, under the FSIA, the Kingdom is immune from Lear's claims related to the TSP contract, but not from Lear's claims related to the SPAGE contract. *Id.* at 8-18.

Applying the standard set out by this Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), which requires courts to focus on the nature of an activity rather than its purpose, the court of appeals held that the TSP contract was governmental in nature and thus Lear's TSP claims did not fall within the commercial activity exception. The court explained that Lear's TSP employees "were integrated with the RSAF" and, as the contract states, they "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft . . . ." Pet. App. 12. The court further stated that "[u]nlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide personnel that were vital to the operation of a national air defense system." Pet. App. 12. The court thus held that "[w]hile the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign. The TSP employees were integrated into the RSAF and can be considered military personnel." *Id.*

The court of appeals also held, however, that "[t]he SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover*. . . . Regardless of the end use of the F 5 components in aircraft that were used for national defense, the SPAGE contract was

for goods and services and is properly construed as commercial activity." Pet. App. 15. As the court explained, the SPAGE and TSP contracts differed in nature because "[t]he SPAGE employees were not integrated with the RSAF, and therefore unlike the personnel working under the TSP contract, they cannot be considered military personnel." *Id.* at 14.

The court of appeals also affirmed the denial of dismissal based on the SPAGE forum selection clause and *forum non conveniens*, discussing only "the controversy regarding the SPAGE contract . . . ." *Id.* at 24. The court did not address the Kingdom's arguments based on the act of state doctrine because those arguments pertained only to Lear's claims under the TSP contract. *Id.* at 25-26.[3]

On September 11, 2009, the court of appeals denied petitions for rehearing in a *per curiam* order. *Id.* at 87.

ARGUMENT

A. The Court of Appeals Correctly Applied Settled Law to the Specific Facts of this Case

Lear contends that certiorari is warranted because the court of appeals supposedly erred in holding that the TSP contract was governmental in nature. That fact-bound contention is incorrect and, in all events, would not warrant this Court's plenary review.

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[3] Simultaneously with this brief, the Kingdom is filing a conditional cross-petition with respect to the court of appeals' *forum non conveniens* holding. *See* Sup. Ct. R. 12.5.

1. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a civil action brought in a United States court. *Argentine Republic v. Armada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). Under the FSIA, foreign states are immune unless a claim falls within one of several specified exceptions. 28 U.S.C. § 1604. As relevant in this case, the "commercial activity" exception provides that a foreign state is not immune with respect to a claim based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* § 1605(a)(2). The FSIA defines the term "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the [activity], rather than by reference to its purpose." *Id.* § 1603(d). Courts applying the commercial activity exception accordingly focus on the nature, not the purpose, of a foreign state's activity. *Weltover*, 504 U.S. at 612.

2. Lear concedes that the court of appeals correctly "acknowledged that controlling authority required it to look at the nature, and not the purpose, of the TSP . . . ." Pet. 17; *accord* Pet. for Reh'g En Banc at 8 (same); Pet. for Panel Reh'g at 11 ("[T]he Opinion correctly states the test for determining whether an activity is commercial for purposes of the FSIA . . . ."). Lear nevertheless contends that the court of appeals, on the particular facts of this case, based its decision "on the purpose of the TSP contract" rather than its nature. Pet. 17. That contention does not withstand scrutiny.

After quoting in full the statutory definition of "commercial activity" (including the directive to focus on the nature of a foreign state's activity rather than its purpose), the court of appeals discussed at length this Court's "helpful explanation of the commercial activity exception in [*Weltover*]," specifically this Court's emphasis on the nature of an activity rather than its purpose. Pet. App. 9-11. In assessing the nature of the TSP contract, the court of appeals emphasized that Lear's TSP employees "worked directly for and under the control of the RSAF," *id.* at 12; those employees "were integrated into the RSAF and can be considered military personnel." *Id.*; *accord id.* ("Employees under the TSP contract performed their work in Saudi Arabia and were integrated with the RSAF."); *id.* at 3 ("These employees were integrated with RSAF personnel . . . .").

The court of appeals further explained that, as the contract states, the TSP workers "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft . . . ." *Id.* at 12. Based on these factors, the court held that the TSP contract was governmental in nature. *Id.* at 12-13; *see* H. Rep. 94-1487, 94th Cong., 2d Sess., at 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 ("public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel," whereas employment of "clerical staff or public relations or marketing agents" is commercial in nature).

In reaching this conclusion, the court of appeals faithfully applied this Court's decision in *Weltover*:

> Unlike a contract to buy army boots or bullets, as the Supreme Court discussed [in *Weltover*], the TSP was a contract to provide *personnel* that were vital to the operation of a national air defense system. While the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign. *The TSP employees were integrated with the RSAF and can be considered military personnel.*

Pet. App. 12 (emphases added); *see Winter v. Natural Resource Def. Council*, 129 S. Ct. 365, 377 (2008) ("[D]ecisions as to the composition, training, equipping, and control of a military force . . . are essentially professional military judgments." (citation and internal quotation marks omitted)); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (holding that a foreign state's agreement with a U.S. contractor for employment of security personnel was governmental in nature).

Lear incorrectly faults the court of appeals for acknowledging that Lear's TSP employees helped "minimiz[e] the time aircraft were unavailable for defense" and were "vital to a national air defense system." Pet. 17-18 (quoting Pet. App. 12). According to Lear, those statements address the purpose of the TSP contract, not its nature, and thus the court of appeals erred. *Id.* Lear's conclusion, however, does not follow from its premise. As discussed, the court of appeals explained that the TSP contract was

governmental both in purpose *and* in nature: "While the purpose of the TSP contract was undeniably sovereign, the nature of the contract was also sovereign." Pet. App. 12. Merely noting the purpose of an activity, while ultimately relying on the nature of the activity, does not, as Lear suggests, "direct[ly] contraven[e]" *Weltover*. Pet. 17.

Indeed, the court of appeals' holding with respect to the SPAGE contract illustrates that the court was acutely aware of the distinction between the nature and purpose of an activity, and that the nature of the activity is controlling. The court held that the SPAGE contract was commercial in nature notwithstanding its governmental purpose, thus concluding that the Kingdom was not immune from claims under the SPAGE contract. In contrast to the TSP, the court stated that "[t]he SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover*. . . . Regardless of the end use of the F 5 components in aircraft that were used for national defense, the SPAGE contract was for goods and services and is properly construed as commercial activity." Pet. App. 15. The court explained that the SPAGE and TSP contracts differed in nature because "[t]he SPAGE employees were not integrated with the RSAF, and therefore unlike the personnel working under the TSP contract, they cannot be considered military personnel." *Id.* at 14.

3. Contrary to Lear's suggestion, the decision below does not create any division of circuit authority warranting this Court's review. Pet. 15-18. First, none of the cases Lear cites conflicts with the decision below because none involved employment of military personnel, the central factor in the court of appeals' analysis of the nature of the TSP contract.

Thus, *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006), on which Lear primarily relies, Pet. 16-17, is entirely inapposite to the TSP contract. In that case, a police informant filed suit in the United States after Peru reneged on its offer of a $5 million reward for anyone providing information leading to the location and capture of a fugitive. *Guevara*, 468 F.3d at 1293. The Eleventh Circuit rejected Peru's FSIA defense, holding that "the underlying activity at issue – the exchange of money for information – is commercial in nature" and thus the informant's claims fell within the commercial activity exception. *Id.* at 1299. Unlike the Kingdom's TSP contract, however, in *Guevara*, the foreign state did not contract to *employ* law enforcement personnel or otherwise to augment its police or military.[4]

Second, the decision below does not, as Lear suggests, conflict with prior Fifth Circuit decisions. Pet. 15-18 (relying on *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), and *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375 (5th Cir. 1992)). On the contrary, the court of appeals in this case did not disturb any of its prior decisions and, in fact, favorably cited *Walter Fuller Aircraft Sales* to support its holding that the SPAGE contract was commercial in nature. Pet. App. 15. The Fifth Circuit then declined to credit Lear's claims of an intra-circuit conflict in petitions for rehearing. *See* Pet. App. 87-88; Pet. for

[4] Lear also identifies numerous cases involving government contracts that were held to be commercial in nature, but none involved employment of military personnel and, in all events, none conflicts with the court of appeals' decision holding that the TSP contract was governmental in nature. *See* Pet. 15-17 & n.7 (citing cases).

Reh'g En Banc at 7-8. In any event, this Court does not sit to resolve asserted intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 901 (1957) (per curiam).

4. Grasping at straws, Lear also contends that this Court should grant review to address a supposed "circuit split" in cases involving "employment disputes between foreign governments and consular or civil service personnel." Pet. 33. But this case, which involves *military* personnel, is not an appropriate vehicle to address an issue involving alleged *diplomatic* and *civil service* personnel. As Lear concedes, the cases reflecting the supposed split "do not apply" here. Pet. 24. None of those cases involved employment of military personnel, and most did not even involve employment of consular or civil service personnel. *See El-Hadad v. United Arab Emirates*, 496 F.3d 658, 667 (D.C. Cir. 2007) ("We therefore hold that El-Hadad is not a civil servant . . . ."); *Holden v. Canadian Consulate*, 92 F.3d 918, 922 (9th Cir. 1996) (employee was "more analogous to a marketing agent" than a diplomat or civil servant); *Segni v. Commercial Office of Spain*, 835 F.2d 160, 166 (7th Cir. 1987) (employee was a "marketing agent" and "cannot be considered either as a civil servant or a diplomatic officer").

In all events, there is no division of circuit authority. In the cases on which Lear relies, as here, courts of appeals, consistent with *Weltover*, determined the character of a foreign state's activity based on its nature rather than its purpose. *See Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (court's "central inquiry" was the "distinction made in the text of the FSIA between activities that are by nature 'commercial' and those that are not"); *Holden*, 92 F.3d at 922 ("[W]e examine the nature of the act, and not

the purpose behind it."); *Segni*, 835 F.2d at 163 ("[T]he nature, rather than the purpose, of the act under scrutiny . . . will guide us to our ultimate conclusion.").

Moreover, contrary to Lear's suggestion, the D.C. Circuit in *El-Hadad* did not recognize a circuit split. 496 F.3d at 664 n.2. In fact, the D.C. Circuit specially noted that, "like many of our sister circuits, we have held that a foreign government's civil servants (and diplomats and soldiers) do *not* qualify for the commercial activity exception." *Id.* at 664 (citing *Kato*, *Holden*, and *Segni*). Notwithstanding this language of consensus, the sovereign defendants in *El-Hadad* sought certiorari based on the same supposed "split" now advocated by Lear. Pet. for a Writ of Certiorari at 19-24, United Arab Emirates v. El-Hadad, 128 S. Ct. 1872 (2008) (No. 07-853), 2007 WL 4631295 (Dec. 20, 2007). This Court denied review in *El-Hadad*. 128 S. Ct. 1872 (2008).

5. Finally, Lear requests that this Court resolve a question Lear contends was "left open" in *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 n.4 (1993), concerning treatment of an activity that has both governmental and commercial elements. Pet. 31. In the proceedings below, however, Lear did not raise this issue and, thus, neither the district court nor the court of appeals addressed it.[5] Accordingly, the issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised or involved in the lower court."); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (same).

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[5] Lear raised this issue for the first time in a petition for rehearing in the court of appeals. *See* Pet. for Reh'g En Banc at 9-10.

Even if Lear had preserved the issue, this is not a so-called "'mixed' case that involves sovereign and commercial elements." Pet. 31. *All* of the TSP workers were "integrated into the RSAF," Pet. App. 12, and "worked directly for and under the functional control of the RSAF." *Id.* at 3. That those workers performed various functions within the Saudi military is irrelevant and, in fact, improperly emphasizes the purpose rather than the nature of the TSP contract, which was for employment of "military personnel," *id.* at 12, whatever their function.

B. The Court of Appeals Correctly Recited the Facts of this Case

Unable to show that the decision below misstates the law, Lear seeks to mire this Court in the facts of the case, arguing that the court of appeals relied on "new findings of fact not mentioned by the district court (or found in the record) and other facts contrary to the district court's factual findings." Pet. 22-23; *see id.* at 27 (acknowledging that the decision below involved "fact-intensive determinations by [the] appeals court"); Pet. for Panel Reh'g at 3 ("Based on [a] misapprehension of fact, the Panel determined that the TSP contract was not commercial in nature."). But this Court does not sit to review factual findings. *See* Sup. Ct. R. 10.

In any case, the court of appeals did not disturb the district court's factual findings or find any new facts. Rather, the court of appeals relied on the plain terms of the parties' contracts to assess the nature of each and, with respect to the TSP, reached a different legal conclusion than the district court. Thus, there is no

reason for Lear's extended discussion of the correct standard of review from a district court's jurisdictional findings of fact in an interlocutory FSIA appeal under the collateral order doctrine. *See* Pet. 23-27.

Tellingly, Lear fails to identify any fact that the court of appeals found contrary to the district court. Lear asserts that "there is no support in the record for the assertion that [the TSP workers] were 'integrated' into the RSAF or could 'be considered military personnel.'" Pet. 27-28 (quoting Pet. App. 12) (emphasis omitted). But the TSP contract expressly states that Lear "shall provide directed manning augmentee personnel to work directly for and under the functional control of the RSAF" in Saudi Arabia. KRE6-099; *accord* KRE6-097 ("All directed manning augmentees provided by this [contract] shall be functionally controlled by the RSAF."); *see also* KRE6-099 ("The RSAF may direct that any Contractor directed manning personnel be sent . . . to any location."). The court of appeals correctly stated that, as set out in the contract, the TSP workers were integrated in the RSAF as military personnel. This is not inconsistent with the district court's statement that recruitment and hiring were Lear's responsibilities. *See* Pet. 28 (quoting Pet. App. 55).

Next, Lear asserts that the record "contains no support for the Fifth Circuit's statement that [Lear's] employees were providing 'vital' services that were 'sovereign' in nature." Pet. 28 (quoting Pet. App. 12). Lear's own allegations in this case, however, demonstrate the critical import of the TSP contract to the Saudi military. *See, e.g.*, Doc. 1:5 (TSP contract was "needed to operate [the Kingdom's] F-5 aircraft");

id. at 6 ("At its core, the F-5 TSP contract required [Lear] to recruit technically-qualified personnel in the United States and export the expertise and services of these individuals from the United States to assist and train [RSAF] personnel."). In all events, it is beyond reasonable dispute that this Court's review is unwarranted to revisit whether Lear's services were vital.[6]

Finally, the court of appeals did not err in disregarding the Kingdom's so-called "admissions" that the TSP was a "direct commercial contract." Pet. 29 (citing DX 2, Annex B; Appx. 140, 161-65). Saudi military officers used that characterization in Saudi Arabia in the mid-1990s to distinguish the Kingdom's contracts with private contractors such as Lear from its contracts with other sovereigns. The use of this shorthand nomenclature, which Lear wrenches out of context to suggest some connection to this litigation, has no bearing on the legal question whether Lear's TSP claims fall within the FSIA's commercial activity exception to sovereign immunity.

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[6] The record also supports – and Lear does not meaningfully dispute – the court of appeals' other observations regarding the TSP workers, including that they "provided flight operations services and training to the RSAF," "trained pilots in survival skills, including escape and evasion, and ejection over sea, desert, or mountain terrain," and "performed maintenance on the F-5 aircraft." Pet. App. 15.

C. Lear Dramatically Overstates the Ramifications of the Court of Appeals' Decision

As to the broader significance, if any, of the decision below, Lear devotes its energy to hyperbole and tearing down straw man arguments.

For example, Lear asserts that the decision below would allow foreign states, in violation of federal regulations, to "transfer U.S. military technology to Iran or North Korea, without any legal recourse in the United States . . . ." Pet. 22. As support for this ominous declaration, Lear points to a Technical Assistance Agreement ("TAA") signed by the Kingdom in connection with the TSP contract. *Id.* at 21-22. However, Lear is not even a party to the TAA, which was a separate agreement between the Kingdom and the United States government. *See* LRE 35-36. The enforceability of the TAA is not at issue in this case, and nothing in the decision below would permit the Kingdom (or others) to violate federal regulations prohibiting the transfer of U.S. military technology.

Lear also asserts that the decision below "threatens the viability of DCS [direct commercial sales] arrangements" under the Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.* Pet. 21. According to Lear, the court of appeals' reasoning indicates that "virtually" all foreign military defense contracts, including all contracts for "vital" or "military-related services," are governmental in nature. *Id.* But Lear's doomsday warning rings especially hollow in light of the court's holding that the SPAGE contract, a DCS agreement, was commercial in nature. Pet. App. 15.

For its part, Lear proposes the untenable rule that all government contracts are commercial. *See* Pet. 15-18. The decision below, however, does not reflect any broad pronouncement; rather, the court of appeals reached fact-bound determinations only as to the nature of the SPAGE and TSP contracts, *see* Pet. 27, relying, for the TSP, on the nature of employment of "military personnel." Pet. App. 12. Other DCS contracts, such as the SPAGE, may well be commercial in nature, but those questions are not before this Court.

In addition, the court of appeals did not, as Lear suggests, "create an entirely new distinction between 'goods' and 'services'" for purposes of the commercial activity exception to sovereign immunity. Pet. 18. Again, Lear's contention is belied by the court of appeals' approach to the SPAGE contract. The court determined that "the SPAGE contract was for goods *and services* and is properly construed as commercial activity." Pet. App. 15 (emphasis added). Moreover, as stated, the court's analysis of the nature of the TSP contract focused on employment of "military personnel," *id.* at 12, and not broadly on all services.

Lastly, Lear complains that the decision below leaves Lear (and potentially other U.S.-based defense contractors) without a remedy. Pet. 21. On the contrary, the SPAGE and TSP contracts contain forum selection clauses that specify resolution of any disputes in the Board of Grievances in Saudi Arabia. Pet. App. 19; KRE6-090. Whether those contractual forum selection clauses are mandatory or permissive, they specifically provide a remedy, which Lear itself elected to decline, in Saudi Arabia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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